BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

WILLIAM J. HUERTER Claimant VS. **ORVAL JUENEMAN DOZER SERV. INC.** Respondent AND **TRAVELERS INDEMNITY CO.** Insurance Carrier	)	Docket No. 1,058,888

ORDER

STATEMENT OF THE CASE

Claimant requested review of the February 8, 2012, Preliminary Hearing Order entered by Special Administrative Law Judge Jerry Shelor. Michael J. Patton, of Topeka, Kansas, appeared for claimant. Katharine M. Collins, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

The Special Administrative Law Judge (SALJ) denied claimant's request for workers compensation benefits, finding he did not provide respondent notice of his accident within 30 days.

The record on appeal is the same as that considered by the SALJ and consists of the transcript of the February 8, 2012, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant argues that he was not physically able to report an injury from an accident because he was unaware of his injury. He did not know he had a retinal tear in his eye until informed of this fact by a physician more than 30 days after the work-related accident. Claimant argues that the 30-day notice requirement should therefore be waived. Claimant also asks for review of whether respondent or respondent's duly authorized agent had actual knowledge of his injury, also thereby waiving the 30-day notice requirement.

Respondent argues that claimant did not provide it with notice of an injury within 30 days as required by K.S.A. 2011 Supp. 44-520.

The issue for the Board's review is: Did claimant provide respondent with notice of accident within 30 days? If not, should the 30-day notice requirement be waived?

FINDINGS OF FACT

Claimant began working for respondent in April 2011 as a laborer, truck driver and heavy equipment operator. On September 14, 2011, claimant was helping Roger Jueneman, one of his supervisors, move a concrete saw. Claimant said a coworker, Dean Huddleston was standing immediately across from claimant. Mr. Jueneman was just to claimant's left, holding the saw, when claimant was hit in the right eye by the saw. Claimant testified he was hit hard enough that he saw stars and was nearly knocked out. He staggered back and sat down in a chair, holding his eye. He thought Mr. Jueneman and Mr. Huddleston would both have seen the accident or have seen him sitting in a chair with his hand over his eye. However, neither Mr. Jueneman nor Mr. Huddleston said anything to claimant. Claimant did not say anything to anyone at respondent that day about the accident or injuring his eye. When claimant got home that evening, he had a black eye. When he returned to work the next day, no one at respondent said anything to him about the black eye, nor did claimant report the injury to anyone at respondent.

Sometime in late October 2011, claimant noticed he was having problems with his vision. He was examined by Dr. Brian Carpenter, an optometrist, on November 23, 2011. Dr. Carpenter told claimant he had a retinal tear and needed to see a specialist immediately. That same day, claimant traveled to Lincoln, Nebraska, where he was seen by a specialist whose name he could not remember. The specialist told him he had two retinal tears and needed immediate surgery. Surgery was scheduled for that same evening and was performed by Dr. David Pan.

After the surgery, Dr. Pan told claimant he had found three retinal tears in claimant's right eye. Claimant also testified that Dr. Pan said that because of the amount of damage in his right eye, the retinal tears had to have been caused by some sort of trauma. Dr. Pan also said claimant would be at a high risk for developing cataracts because of the injuries, and claimant has now also been diagnosed with cataracts.

Claimant testified that after he had been examined by Dr. Carpenter and diagnosed with a retinal tear, he called respondent and spoke with the receptionist. Claimant told the receptionist his diagnosis and said he would be going to Lincoln for treatment. This was the first time claimant told anyone at respondent that he had injured his eye.

Roger Jueneman testified that he is part-owner of and a foreman at respondent. He recalled unloading a concrete saw from the back of a pickup with claimant, but he did not recall any injuries to claimant at that time. Mr. Jueneman said he and claimant just

picked the saw up out of the back of a pickup truck and set it on the ground. Mr. Jueneman did not recall that anyone other than claimant was helping him unload the saw from the pickup truck. Claimant said nothing to him after helping him unload the saw. Mr. Jueneman said he thought claimant came to work the next day, but he did not notice that claimant had a black eye or any other sign of injury. Between September 14, 2011, and November 23, 2011, claimant never reported an injury to his right eye to Mr. Jueneman.

Dean Huddleston testified that he worked for respondent at the rock quarry. He testified he was certain he did not help claimant and Mr. Jueneman unload a concrete saw. He did not recall being in the vicinity where Mr. Jueneman and claimant were unloading a saw from a pickup. He did not see an incident where claimant was struck in the right eye as he unloaded a saw from a pickup. Claimant never told Mr. Huddleston that he had injured his right eye at work. Between September 14, 2011, and November 23, 2011, Mr. Huddleston did not see claimant with a black eye.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b states in part:

> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident . . . arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
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> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-520 states in part:

> (a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:
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> (A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;
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> (B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or
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> (C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.
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> Notice may be given orally or in writing.
>
> . . . .

> (4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.
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> (b) The notice required by subsection (a) shall be waived if the employee proves that (1) the employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.

K.S.A. 2011 Supp. 44-508 states in part:

> (d) ''Accident'' means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. ''Accident'' shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2011 Supp. 44-508 further defines "injury" as:

> (f)(1) ''Personal injury'' and ''injury'' mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

In *Angleton*,[1] the Kansas Supreme Court held:

> Where death occurs to an employee arising out of and in the course of employment, but the fact of death is not ascertained or reasonably ascertainable until a date later than the actual date of death, the limitations of K.S.A. 44-520a(a) do not apply until the death of the employee is ascertained or is reasonably ascertainable.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[2] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted

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[1] *Angleton v. Starkan, Inc.*, 250 Kan. 712, Syl. ¶ 8, 828 P.2d 933 (1992).

[2] K.S.A. 2011 Supp. 44-534a(a)(2); see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[3]

ANALYSIS

Claimant contends that he should not be subject to the 30-day notice of accident requirement because he was physically unable to give such notice. By this, claimant means that he was unaware of the nature and extent of his injury until his retinal tears were diagnosed on November 23, 2011. But knowledge of an accident is different than knowledge of an injury. Claimant knew immediately that an accident had occurred on September 14, 2011. He testified he was hit hard enough that he saw stars and was nearly knocked out. He staggered back and had to sit down. Later that same day, he noticed that he had a black eye. This is also knowledge of an injury, albeit not complete knowledge of all his injuries.

The fact that claimant knew he was involved in a work-related accident is further supported by claimant's assertion that his supervisor, Roger Jueneman, was present at the time and witnessed his accident and respondent thereby had actual knowledge of his injury. Respondent could not be found to have actual knowledge if claimant could not. Claimant also asserts that his supervisor should have subsequently observed his black eye and thus also have actual knowledge of his injury. Unfortunately, Mr. Jueneman testified and said he neither witnessed the accident claimant described nor observed claimant with a black eye. Claimant's coworker, Mr. Huddleston, also testified at the preliminary hearing before the SALJ and said he likewise did not witness an accident and between September 14, 2011, and November 23, 2011, he never saw claimant with a black eye.

The SALJ observed the in-person testimony of all three witnesses. He apparently found Mr. Jueneman and Mr. Huddleston to be credible because he denied claimant's request for benefits, finding "[c]laimant has failed to sustain his burden of proof that appropriate notice of accident was provided within thirty days."[4]

Claimant admits he never reported his accident or injury to any of his supervisors within 30 days of September 14, 2011. Claimant argues he was unable to give notice of injury until he became aware of the retinal tears. Although the statute provides that notice of injury by accident must be given within 30 days, it does not require notice of every possible injury suffered as a result of the accident. Claimant was aware immediately that he had an accident on September 14, 2011. Subsection (B) of K.S.A. 2011 Supp. 44-520(a)(1) provides for an even shorter 20-day time period for giving notice when medical treatment is being sought. Arguably, subsection (A) extends that 20 days to 30 days when

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[3] K.S.A. 2011 Supp. 44-555c(k).

[4] SALJ Preliminary Hearing Order (Feb. 8, 2012) at 1.

the employee seeks medical treatment but does not know of a work-related injury. The fact that claimant did not think he was injured sufficiently to warrant medical care is unfortunate. Prior to May 15, 2011, such a circumstance could be considered as just cause to enlarge the time for giving notice. But the Kansas Legislature saw fit to remove the possibility of enlarging the time for giving notice beyond 30 days. The fact that claimant was unaware of the severity of his injury is irrelevant under the current statute for purposes of extending the time for giving notice beyond 30 days from the date of accident. Furthermore, whether or not claimant knew of the severity of his injury, claimant did know of his accident and knew he was injured in some degree, at least to the extent of having a black eye. He was physically able to give notice of his accident and of some degree of injury throughout the 30 days beginning September 14, 2011. Ultimately, even if claimant did not know he was injured, K.S.A. 2011 Supp. 44-520(a)(1) requires notice be given by the earliest of the enumerated dates, the first being "(A) 30 calendar days from the date of accident."

CONCLUSION

Claimant failed in his burden to prove he gave notice of injury by accident to his employer within 30 calendar days from September 14, 2011, the date of his accident. Claimant failed to prove this notice requirement should be waived either because the employer had actual knowledge of the injury or claimant was physically unable to give such notice.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Special Administrative Law Judge Jerry Shelor dated February 8, 2012, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April, 2012.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Michael J. Patton, Attorney for Claimant
Katharine M. Collins, Attorney for Respondent and its Insurance Carrier
Jerry Shelor, Special Administrative Law Judge
Rebecca A. Sanders, Administrative Law Judge